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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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01/03/2008

Thomas Landazuri

KOB

6182

7590

09/27/2011

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EXAMINER

MUKHOPADHYAY, BHASKAR

ART UNIT

PAPER NUMBER

1789

MAIL DATE

DELIVERY MODE

09/27/2011

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/585,198	LANDAZURI, THOMAS	
	<b>Examiner</b>	<b>Art Unit</b>	
	BHASKAR MUKHOPADHYAY	1789	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 18 July 2011.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on \_\_\_\_; the restriction requirement and election have been incorporated into this action.
- 4) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 5) ☒ Claim(s) 1-6,8-10 and 16 is/are pending in the application.
- 5a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 6) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 7) ☒ Claim(s) 1-6,8-10 and 16 is/are rejected.
- 8) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 9) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 10) ☐ The specification is objected to by the Examiner.
- 11) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 12) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |   |   |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                    | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-943) | Paper No.(s)/Mail Date: ____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date: ____   | 6) <input type="checkbox"/> Other: ____                           |

### **DETAILED ACTION**

1. Applicants' amendment filed dated 7/18/2011 overcomes the rejections of record, however, the new grounds of rejection as set forth below are necessitated by applicants' amendment and therefore the following action is **final**.

### **Status of the Application**

2. Claims 1-6, and 8-10, 16 are pending.

### **Claim Rejections - 35 USC § 103**

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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4. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

- a. Determining the scope and contents of the prior art.
- b. Ascertaining the differences between the prior art and the claims at issue.
- c. Resolving the level of ordinary skill in the pertinent art.
- d. Considering objective evidence present in the application indicating obviousness or nonobviousness.

5. Claims 1, 2-4, 8-10, and 16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Porcello et al., USPN 4865859 in view of McDonald et al., USPN 303021 and further in view of Yajima, USPN 4911942.

6. Regarding claims 1, 2-4, 8- 10, and 16, Porcello et al., discloses cream filler composition (col 10, line 11) for sandwich cookies and other foods ( Abstract) having lipid fraction composed of vegetable oils like from 25 to about 75 % by wt. cottonseed oil (col 4, lines 63-65), from about 10-55 % by wt. soybean oil (col 4, line 39). Porcello also teaches about soybean oil can be mixed with cottonseed oil (col 4, lines 32-35) or rapeseed oil (col 5, line 41). Porcello et al., therefore, meet the amended claim limitations "A composition (i.e. food composition like sandwich cookies; Abstract) comprising a cream filler, the cream filler further comprising" in **claim 1** and food composition as claimed in **claim 16**. It is clear that these oils are liquid oil at room temperature possesses SFI of zero and is selected from vegetable oil and therefore it is

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also clear that the composition is free from saturated fat i.e. meets claimed limitation of 0% saturated fat as claimed in claim 1.

Porcello et al., disclose about optionally the oils may be partially hydrogenated (col 4, line 34 e.g. "may be modified") and therefore, meet the presently claimed limitation that partially hydrogenated fat fraction is not required, i.e. 0%. It is well known that with natural vegetable oil e.g. soybean oil without partial hydrogenation having SFI of about zero at room temperature (25 degree C) to meet claims 2 and 3 as presently claimed.

Porcello et al., also teach about filler cream composition contain more than about 60% by wt of sugar and the sugar may be pre ground ( col 5 lines 50-52; col 6, lines 1-5).

Porcello et al., however, do not teach the food composition with cream filler comprising "oil and gliadin" and "increased gliadin content and ratio" in the composition.

McDonald teaches that the composition butter cream-type frosting with oil and gliadin ( col 4 lines 50-65) is used to a food product composition (col 1 lines 5 - 40) and, therefore, McDonald addresses the amended claim limitations " A composition comprising a cream filler , the cream filler further comprising" to address claims 1 and food composition as claimed in claim 16.

McDonald teaches that the amount of gliadin can be added in butter cream type frosting and use of gliadin as deamidized gliadin in the composition (col 4, lines 50-65). It is clear that the amount of gliadin 0.1-5% (col 3, line 40) in the composition can be obtained from twice the amount of gluten from wheat as gliadin comprises one half of

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the protein in gum gluten ( col 1, lines 45-50) and that extracted gliadin by alcohol extraction from wheat gluten ( col 1, lines 45-50) contributes predominantly gliadin. Therefore, this would intrinsically increase the amount of gliadin content compared to natural gliadin content in wheat gluten, with the negligible other protein e.g. glutenin and therefore, gliadin /glutenin ratio is definitely more than 3 to meet claims 7 -9. The motivation is smoother texture, higher gloss, and improved stability (col 2, lines 25-32).

Regarding **claim 10**, although Porcello et al. in view of McDonald and Yajima do not disclose step by step the presently claimed method, McDonald teaches gliadin from gluten and Yajima teaches that 'wet gluten' and gluten obtained after drying (col 3 lines 43-45). One of ordinary skill in the art would also use the method as evidenced by the applicants own disclosure in the specification the reference WO 03/0134266 (PG PUB [0061]).

It is also noted that "[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process", *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985). Further, "although produced by a different process, the burden shifts to applicant to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product", *In re Marosi*, 710 F.2d 798, 802, 218 USPQ 289, 292 (Fed. Cir.1983). See MPEP 2113.

Therefore, absent evidence of criticality regarding the presently claimed process and given that Porcello et al. in view of McDonald meets the requirements of the claimed composition, McDonald clearly meet the requirements of present claim 10.

It would have been also obvious to one of ordinary skill in the art to include the teaching of McDonald into Porcello et al. One of ordinary skill in the art would have been motivated to use deamidized gliadin in order to achieve smoother texture, higher gloss, and improved stability (col 2, lines 25-32).

Regarding **claims 8-9**, Yajima also teaches that viscosity results from gliadin and the elasticity results from glutenin (col 3, lines 9-11). Interestingly, Yajima (USPN 4911942) also teaches that the oil from 0.1 to 4 parts by weight per part by weight of gliadin and/or glutenin can be added (col 4 lines 1-3). Therefore, it would have been obvious to one of ordinary skill in the art to combine (i) both the oils or fats with gliadin and glutenin and (ii) keeping oil amount constant, gliadin/glutenin at the desired ratio [e.g. 0.33 parts oil with one part gliadin and 0.33 parts glutenin which makes gliadin/glutenin 3:1 and oil/glutenin =  $0.33/.33 = 1$  (within 0.1 to 4 parts):1 and oil/Gliadin  $0.33:1 = 0.33$  (within 0.1 to 4 parts)] as claimed in **claims 1, 8 and 9**. One of ordinary skill in the art would have been motivated to use gliadin and/or glutenin is also to prevent contact of the oils or fats with oxygen, thereby inhibiting degradation of oils or fats and oils are covered with gliadin and/or glutenin (col 2 lines 45-55). Therefore, the motivation to include glutenin or gliadin is to protect oil from oxidation, however the motivation for the ratio is due to achieve optimal viscoelastic property. The reason for the motivation to use gliadin/glutenin ratio at least 2.0, 2.5, 3.0 in order to achieve the

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desired viscoelastic (organoleptic) property and highly stabilized oil composition (col 4, lines 65-67) in the final product. One of ordinary skill in the art would also use the method as evidenced by the applicants own disclosure in the specification the reference WO 03/0134266 (PG PUB [0061] to determine the ratio.

Additionally, since the instant specification is silent to unexpected results, the specific ratio of gliadin/glutenin is not considered to confer patentability to the claims. As the viscoelastic property and stability are variables that can be modified, among others, by adjusting the amount of gliadin/glutenin, the precise amount would have been considered a result effective variable by one having ordinary skill in the art at the time the invention was made. As such, without showing unexpected results, the claimed amount cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the amount of gliadin/glutenin in Yajima to amounts, including that presently claimed, in order to obtain the desired effect e.g. viscoelastic property and stability etc. (In re Boesch, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (In re Aller, 105 USPQ 223).

It would have been obvious to one of ordinary skill in the art at the time of invention to include the teaching of Yajima into Porcello et al. in view of McDonald. One of ordinary skill in the art would have been motivated to use gliadin and/or glutenin is also to prevent contact of the oils or fats with oxygen, thereby inhibiting degradation of



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oils or fats and oils are covered with gliadin and/or glutenin (col 2 lines 45-55).

Therefore, the motivation to include glutenin or gliadin is to protect oil from oxidation, however the motivation for the ratio is due to achieve optimal viscoelastic property. The reason for the motivation to use gliadin/glutenin ratio at least 2.0, 2.5, 3.0 in order to achieve the desired viscoelastic (organoleptic) property and highly stabilized oil composition ( col 4, lines 65-67) in the final product.

7. Claims 5-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Porcello et al., USPN 4865859 in view of McDonald et al., USPN 303021 and Yajima , USPN 4911942 as applied to claim 1, and further in view of Yost, USPN 5374438.

Porcello et al., USPN 4865859 in view of McDonald et al. and Yajima, do not teach artificial sugar or the combinations of natural and artificial sugar in the cream filler composition.

Yost teaches about the use of natural sweetener or artificial sweetener or a mixture of these (col 6, lines 38-47) in an amount of 60- 65% (col 7 lines 11-15) in the composition to meet claims 5-6. The motivation is to provide sweet cream (col 6, line 37) and high density sandwich cookie with quick setting, less cooling to ease method of production and desired organoleptic properties in the composition (col 7 lines 11, 37-40, 42) and also use of artificial sweetener can enhance sweetening power with the addition of smaller amount to retain the texture and contributing least calkorie in the product.

It would have been obvious to one of ordinary skill in the art at the time of invention to include the teaching of Yost into Porcello et al., in view of McDonald and

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Yajima. One of ordinary skill in the art would have been motivated to provide sweet cream (col 6, line 37) and high density sandwich cookie with quick setting, less cooling to ease method of production and desired organoleptic properties in the composition (col 7 lines 11, 37-40, 42) and also use of artificial sweetener can enhance sweetening power with the addition of smaller amount to retain the texture and contributing least calkorie in the product.

### Response to Argument

8. Applicants argue on page 6 2<sup>nd</sup> paragraph that IPER regards Porcello USPN 4865859 as the closest prior art. Yet this examiner found Porcello neither (1) discloses the vegetable oil having a SFI of 0 at r.t. Nor (2) the combination with a gluten fraction having gluten content". However, applicants are directed to the office action in paragraph 7, having rejections based on Porcello et al., USPN 4865859 in view of McDonald et al., USPN 303021.

In paragraph 8, previous office action states "Regarding claims 1, 2-4, 7- 10, and 16, Porcello et al., discloses cream filler composition (col 10, line 11) for sandwich cookies and other foods (Abstract) having lipid fraction composed of vegetable oils like from 25 to about 75 % by wt. cottonseed oil (col 4, lines 63-65), from about 10-55 % by wt. soybean oil (col 4, line 39). Porcello also teaches about soybean oil can be mixed with cottonseed oil (col 4, lines 32-35) or rapeseed oil (col 5, line 41). It is clear that these **oils are liquid oil at room temperature possesses SFI of zero** and is selected

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from vegetable oil and therefore it is also clear that the composition is free from saturated fat i.e. meets claimed limitation of 0% saturated fat as claimed in claim 1. Therefore, it is well understood that the examiner has also mentioned the Porcello teaches SFI value 0. In relation to (2) the combination with gluten, McDonald et al., is used as secondary reference to teach solvent extracted gliadin and the use of enriched gliadin.

As set forth above and prior office action states "McDonald teaches that the amount of gliadin can be added in butter cream type frosting and use of gliadin as deamidized gliadin in the composition (col 4, lines 50-65). McDonald also teaches about convenient source of gliadin is gum gluten obtained from wheat and comprises about one-half the protein and gliadin can be isolated by extraction with alcohol (col 1, lines 45-50). It is well known that gluten contains gliadin and glutenin. It is obvious that the extracted product contributes predominantly gliadin, and therefore, after extraction the wheat gluten fraction would have increased gliadin content as claimed in claim 1. The motivation is smoother texture, higher gloss, and improved stability (col 2, lines 25-32)."

However, in this office action, Yajima, USPN 4911942, which was used for the rejection of claim 7, is used as an additional secondary prior art to address the amended claim 1 which is incorporated with the claim limitation of claim 7.

In this context, examiner is interested to address the applicants' arguments regarding Yajima et al. on page 13. Applicants argue on page 13 that "Yajima is used for teaching increased viscoelastic properties which is neither a feature claimed in the present application nor a feature which provides any motivation". However, it is to be noted that

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the motivation is not always a claim limitation. Motivation is one of the intended features to combine the references according to the law. Therefore, the viscoelastic property which is the characteristics for this composition is achieved in the desired degree (optimal) if one of ordinary skill in the art can maintain the claimed ratio as claimed in claims 8 and 9. Therefore, the reference meets the motivation for the ratio as disclosed in claims 1, 8 and 9. Additionally, the motivation to use gliadin and/or glutenin is also to prevent contact of the oils or fats with oxygen, thereby inhibiting degradation of oils or fats and oils are covered with gliadin and/or glutenin (col 2 lines 45-55). Therefore, the motivation to include glutenin or gliadin is to protect oil from oxidation, however the motivation for the ratio is due to achieve optimal viscoelastic property. Interestingly, another important paragraph from Yajima (USPN 4911942) is worth mentioning in this respect. Yajima teaches that the oil from 0.1 to 4 parts by weight per part by weight of gliadin and/or glutenin can be added ( col 4 lines 1-3). Therefore, it would have been obvious to one of ordinary skill in the art to combine (i) both the oils or fats with gliadin and glutenin and (ii) keeping oil amount constant, gliadin/glutenin at the desired ratio [e.g. 0.33 parts oil with one part gliadin and 0.33 parts glutenin which makes gliadin/glutenin 3:1 and oil/glutenin =  $0.33/.33 = 1$  (within 0.1 to 4 parts):1 and oil/Gliadin 0.33:1 = 0.33 (within 0.1 to 4 parts)] as claimed in claims 8 and 9.

9. Applicants argue on pages 6-9 that uses Cochran in view of McDonald for the rejections of claims 1, 10 and 16. However, in light of amended claims the rejection s using Cochran as primary prior art is withdrawn.

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Porcello teaches the amended claim limitations "A composition (i.e. food composition like sandwich cookies; Abstract) comprising a cream filler (with oil), the cream filler further comprising".

However, McDonald is used as secondary reference for two reasons: (a) to address the amended claim limitations " A composition comprising a cream filler , the cream filler further comprising" and McDonald teaches that the composition with oil and gliadin is used to a food product composition (col 1 lines 5 - 40).

McDonald also teaches that the amount of gliadin 0.1-5% (col 3, line 40) in the composition can be obtained from twice the amount of gluten from wheat as gliadin comprises one half of the protein in gum gluten ( col 1, lines 45-50) and that extracted gliadin by alcohol extraction from wheat gluten ( col 1, lines 45-50) contributes predominantly gliadin. Therefore, this would intrinsically increase the amount of gliadin content compared to natural gliadin content in wheat gluten, with the negligible other protein e.g. glutenin and therefore, gliadin /glutenin ratio is definitely more than 3 to meet claims 1, 8 -9.

Additionally, Yajima, USPN 4911942 is also used in support of the ratio mentioned in claims 1, 8, and 9, and discussed as set forth above in paragraph in this section. Therefore, the rejection is made using Porcello et al., USPN 4865859 in view of McDonald et al., USPN 303021 and further in view of Yajima, USPN 4911942.

## **Conclusion**

10. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

11. A shortened statutory period for reply to this non- final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

12. Any inquiry concerning the communication or earlier communications from the examiner should be directed to Bhaskar Mukhopadhyay whose telephone number is (571)-270-1139.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Humera Sheikh can be reached on (571)-272- 0604. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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